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IN THE

Supreme Court of the United States

No. 697.

October Term, 1947.

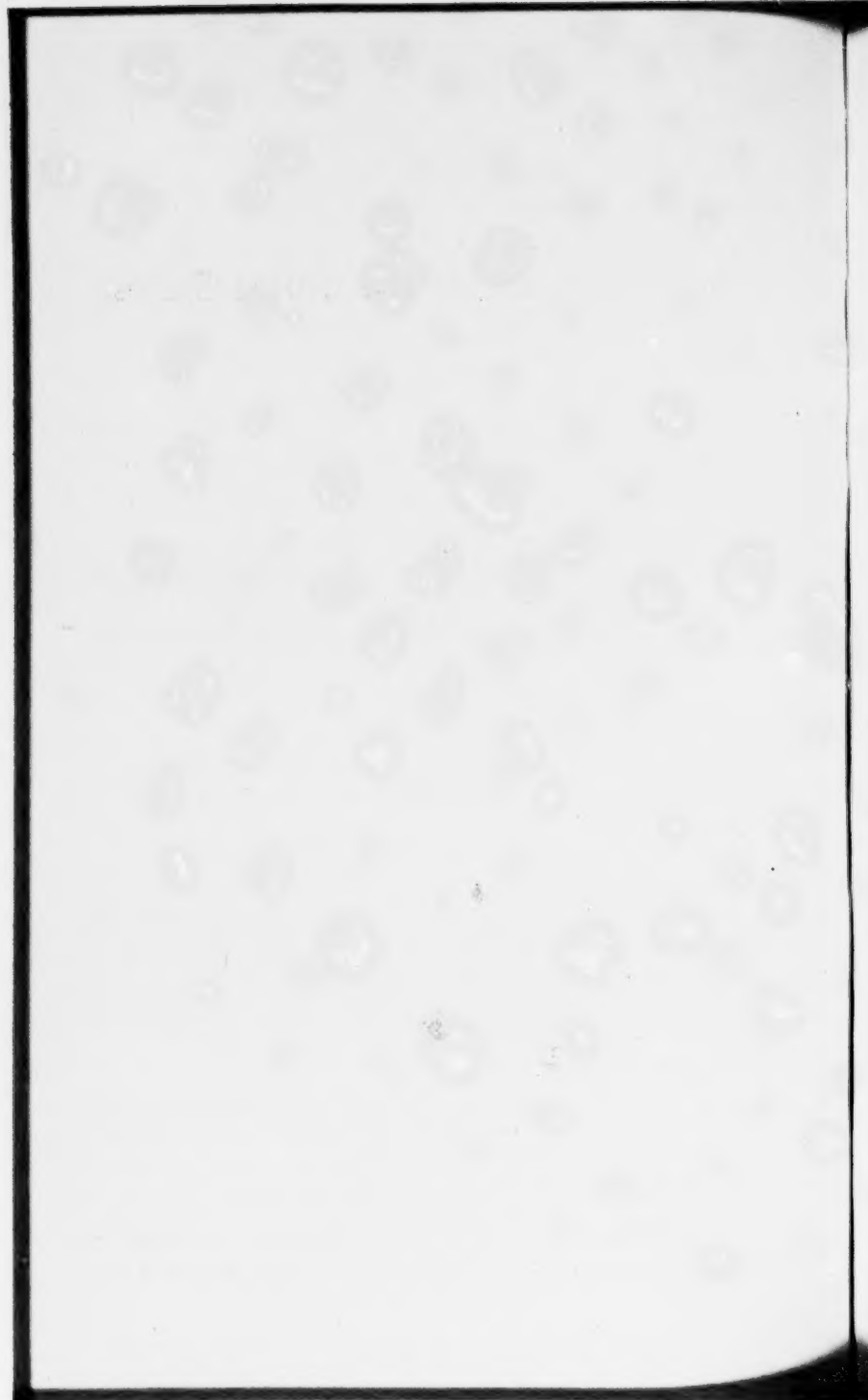
HARRY J. ALKER, JR., and MAMIE DuBAN, Individually,
and as Executrix of the Estate of ALFRED A. DuBAN,
Deceased,
Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent and Appellee Below.

**PETITIONERS' REPLY TO BRIEF OF FEDERAL
DEPOSIT INSURANCE CORPORATION.**

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IN THE
Supreme Court of the United States.

No. 697 October Term, 1947.

HARRY J. ALKER, JR., AND MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED, PETITIONERS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONERS' REPLY TO BRIEF OF FEDERAL DEPOSIT INSURANCE CORPORATION.

To the Honorable Fred M. Vinson, Chief Justice of the United States Supreme Court, and Associate Justices:

The petitioners, because of certain misstatements made in the Brief of Respondent, beg leave to reply to some of them as follows:

1. In the Statement of the Case on page 3 of Respondent's Brief, the Respondent says:

"Respondent acquired this note in January, 1940, together with all the other banking assets of Integrity Trust Company as security for a loan of some twenty million dollars made to it by Respondent."

The record shows that the Respondent on behalf of itself and various other Philadelphia banks acquired and

held the note, together with certain other assets as security for certain loans made by it and said banks, to the Integrity Trust Company, and Respondent acted as liquidator thereof for the benefit of all.

2. The Respondent on page 3 line 16 stated:

"The District Court found that there was no such agreement (Former Record 479a)."

On the contrary the record shows that the District Court did not so find (Original record 479a). Furthermore, the Circuit Court held that there was an agreement.

3. The Respondent on page 4 line 8 of its Brief stated that the papers there referred to were misfiled by Alker. The record does not show this. On the contrary the record shows that they were misfiled by a former employe in Alker's office and were not located until August, 1947.

4. The Respondent on page 4 line 12 of its Brief stated:

"He," (referring to Alker) "may have received them as late as six weeks after December 11, 1936."

Alker did not so contend. The record shows that Alker contended he received them more than six weeks after December 11, 1936.

5. The Respondent on page 5 line 12 of its Brief stated:

"There is no evidence as to how or when or by whom the endorsements which now appear on the original 1931 notes were typed on them. The endorsements could not have been on the notes before December 4, 1936."

The record shows that they were placed thereon by the bank or a representative thereof and could have been on prior to December 4, 1936.

6. The Respondent on page 5 third line from the last stated:

"There is no evidence that any bank examiner was in the bank in December 1936, or in January 1937."

The record shows that Alker was called by the bank, which advised him that the Banking Examiner was there, and that because the note was more than five years old, he had requested that a new note should be given; that the new note was given while the Banking Examiner was there. (Original record 202a, 471a.)

7. The Respondent on page 6 line 27 of its Brief stated:

"Alker's counsel conceded at that hearing that the notation was not on the notes before December 4, 1936, and that the notes were returned to Alker shortly after December 11, 1936."

This is not in accord with the facts as the very application for leave to file the petition for re-hearing shows the following:

"2. The Court overlooks the fact that the Federal Deposit Insurance Corporation relied upon the reports of the State Bank Examiners, one of whom saw or must have seen the old notes with the legends thereon and the new note with the legend thereon as it was one of the State Bank Examiners who insisted upon the new note, and the new note was given while he was there examining the assets of the institution when both sets of notes were in the possession of the Trust Company."

. . .

"7. The Court erred in stating on page 3 of the opinion 'after that date (December 11, 1936) the original notes with the legends were in Alker's files.'

That is not so. Alker was prepared to prove and is prepared to prove by his office manager who was overseas at the time of the trial, and for several years thereafter in combat service, that the original notes with the legends were not returned to Alker for some five or six weeks later after the new note was given on the said date."

8. Again on page 6 line 31 of Respondent's Brief it was stated:

"Alker thus again had his day in court, and has conceded thereat that he cannot prove the only important contentions in this his latest petition to this Court."

Alker did not have his day in court and did not so concede as he was not given the opportunity to present the evidence of John M. Pellini, Jr., who was overseas at the time of the trial, engaged in combat service, and did not return from such service for almost two years after the original trial. Alker does not concede that the notation was not on the notes prior to December 4, 1936, but avers that they were on the notes for some time prior to the time that the new note was requested; and further avers and expects to be able to prove that the notes were not returned for more than six weeks after the date of the new note.

9. The Respondent on page 6, second line from the last of its Brief, stated:

"He," (Alker) "has had a full trial before the United States District Court, followed there by a motion and supplemental motion for new trial and a subsequent attempt, after appeal, to have those motions reconsidered; he has been before the United States Circuit Court of Appeals three times and has unsuccessfully sought review in this Court; always with the same actual issues presented, with the same

controlling law applied and with the same adverse result to his contentions."

Petitioners aver that this is not so. They assert that John M. Pellini, Jr, was overseas in combat service and his testimony could not be gotten; the existence and whereabouts of C. B. Matsinger, a former bank examiner, was unknown at the time of the trial and was not ascertained until long afterwards when the application was made to the Circuit Court. Furthermore, the existence of the first notes was not known until August, 1947; that, had they been produced at the trial and the testimony taken, the petitioners contend the finding would have been in their favor.

10. The Respondent on page 7 line 8 of its Brief stated:

"The petitions in the court below which he now attempts to bring before this Court for review, contain averments which could have been verified before they were made, but which were not, and which, as shown above, he now has conceded to be erroneous."

This is denied by the petitioners and petitioners expect to prove all the averments which they have made if a new trial be granted.

11. On page 7 line 12 of Respondent's Brief it was stated:

"We refer especially to the averment (R. 36, 53) that the notation on the old notes was placed on them before December 4, 1936, and were part of the records of the bank at the time of the bank examinations."

Petitioners believe and have always contended that the notations on the old notes existed thereon prior to their return to Alker by the bank; that they were placed thereon by the bank and that they were part of the records of the

bank at the time of the bank examinations. Petitioners further believe that the notations were placed on the old notes when the agreement was made.

12. Petitioners further contend that the time when the endorsements were put on cannot be determined from a comparison of the notes with the photostats as the photographing of bank records at that time was in its infancy and it was quite possible for the photostats not to catch all that appears on the original instrument.

13. On page 7 line 19 of Respondent's Brief it was stated:

"The dates of the bank examinations are and have always been available to him" (Alker).

Petitioners aver that they were advised that the bank records were confidential and could not be seen by anyone.

14. Petitioners deny that their continued applications are frivolous. On the contrary they aver that they feel that they have been greatly aggrieved and are right in their position and have been so advised by each and every counsel who appeared for them; all of whom are called upon for advice in the matter when necessary; this proceeding being conducted by Alker's own office—he being a lawyer with office associates.

15. As to whether the Federal Deposit Insurance Corporation holds the note and collateral for its own benefit or for the benefit of itself and certain banks, the official public announcement made by the Federal Deposit Insurance Corporation as set forth in the record states the Federal Deposit Insurance Corporation's position in the matter.

16. On page 8 of Respondent's Brief it is stated that the Respondent's loan to the integrity has not been paid in full, nor does it have sufficient cash in hand to pay itself in full. The petitioners were prepared to offer evidence

that the Philadelphia Liquidator of the Federal Deposit Insurance Corporation, in the presence of its counsel, stated to a reputable attorney at law representing a general claim against the Integrity Trust Company that the Respondent had realized sufficient to pay the other banks and pay itself in full. The petitioners were prepared and are prepared to offer evidence to this effect to the District Court if and when a new trial is granted.

Respectfully submitted,

HARRY J. ALKER, JR.,
MAMIE DuBAN, individually, and as
Executrix of the Estate of Alfred
A. DuBan, Deceased.

EDWIN HALL, 2ND,
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